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IN THE

Supreme Court of the United States

GARY LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, *et al.*,

Petitioners,

v.

JOSHUA DAVEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* FOR RELIGIOUS UNIVERSITIES AND COLLEGES, SPECIFICALLY THE ASSOCIATION OF SOUTHERN BAPTIST COLLEGES AND SCHOOLS, THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, AZUSA PACIFIC UNIVERSITY, BRIGHAM YOUNG UNIVERSITY, THE CATHOLIC UNIVERSITY OF AMERICA, LOMA LINDA UNIVERSITY, AND PEPPERDINE UNIVERSITY IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Free Exercise Clause prohibits the government from denying an otherwise-qualified individual equal access to taxpayer-funded benefits solely because he has chosen to use the benefits for goods or services that have a religious character.

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INTERESTS OF *AMICI CURIAE*

Amici are a diverse group of religious educational institutions concerned about the protection of religious liberty for themselves and their students, including protection against discrimination on religious grounds. *Amici* are troubled that laws like the State of Washington provision at issue here could unfairly deny their students the ability to qualify for generally available educational assistance. They also are concerned that, if the law here were found constitutional, other governments might choose to provide taxpayer-funded educational assistance in a way that discriminates against institutions like *amici*.

In seeking to prevent religion-based discrimination in the distribution of public resources, *amici* seek no special favors. Nor do they seek to use these resources in a way that ignores legitimate concerns about the fact or appearance of a religious establishment. What they seek, instead, is equal access—access on the same terms as other individuals and institutions, and in a manner that respects the need for an appropriate separation between church and State.[1]

STATEMENT

At the heart of this case lies a recurring issue of great importance to all religious institutions, their members and students. It is whether, when a government has chosen to create a system of taxpayer-funded benefits for which a person is otherwise qualified, the government may, consistent

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[1] A complete list of *amici*, with descriptions of each organization's interest in this litigation, is set forth in a Statement of Interest of *Amici Curiae* appended to this brief. Petitioners and respondent have consented to the filing of this brief in letters filed with the Clerk's office. The undersigned counsel alone have authored this brief, and no person or entity other than *amici* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.

with the Free Exercise Clause, deny that person equal access to those benefits solely on the ground that they might be used for goods or services that have a religious character rather than a purely secular one.

In recent years, this issue has figured most prominently in the debate over school vouchers. *E.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). But it also has arisen in a variety of other contexts, including the funding of student newspapers, *e.g.*, *Rosenberger* v. *Rectors & Visitors*, 515 U.S. 819 (1995); after-hours access to public school facilities, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001); funding of rehabilitative services to prison inmates, *e.g.*, *Freedom From Religion Foundation, Inc.* v. *McCallum*, 324 F.3d 880 (7th Cir. 2003); tax-exempt financing, *e.g.*, *Steele* v. *Industrial Development Board*, 301 F.3d 401 (6th Cir. 2001), *cert. denied*, 123 S. Ct. 1254 (2003) (No. 02-737), *and*, *id.* at 1273 (No. 02-936), and governmental aid to private colleges, *e.g.*, *Columbia Union College* v. *Clarke*, 159 F.3d 151 (4th Cir. 1998).

This issue has obvious importance for religious individuals and families who might wish to use generally available public benefits to obtain services in keeping with their religious values. Telling these citizens they can use public benefits to obtain services *only* so long as they have a secular rather than a religious character is tantamount to telling them that religion occupies a disfavored place in the community. See generally Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (1993).

This issue also has tremendous importance for institutions that provide services of a religious character, or in a religious environment. In an era when governments fund or subsidize a wider and wider array of goods and services, a rule allowing governments to preclude the use of otherwise-available public funds to purchase services from religiously oriented providers puts those providers at a severe disadvantage solely because

of their religion. And, again, it sends a message to the community that religious providers are somehow suspect or, at least, inferior to secular providers of similar services.

This case aptly illustrates this pervasive problem. Here, the State of Washington chose to create a broad benefit program, the Promise Scholarship, "to encourage excellent academic performance and to reward low- and middle-income students who demonstrated meritorious achievement in high school."[2] See Pet. App. 8a-9a. The program permits recipients to use their scholarships to attend any accredited, in-State higher education institution—be it public or private or even religious. *Id.* The scholarship funds are paid directly to the student—in this case, Respondent Joshua Davey—and may be used to cover a variety of educational expenses, including room, board, and textbooks. J.A. 58. Promise Scholars can choose to study any subjects they wish, including religion. See Pet. Br. 5-6 ("it does not prohibit the secular study of the topic of religion"; indeed, "public colleges and universities in Washington teach about religion"). But an otherwise-qualified recipient is disqualified if he or she chooses to major in one, and only one, course of study: theology. Pet. App. 10a.

In short, under Washington's program, otherwise-qualified beneficiaries may be disqualified because their choice of major is religiously motivated, that is, they wish to study religion *from a religious perspective*. See *id.* Such a policy carries an obvious message of disapproval of respondent's religious beliefs and, indeed, his religious motivation.

Washington's policy also carries with it a message of disfavor to religious institutions. Here, respondent was awarded a Promise Scholarship and sought to use it to major in pastoral studies (as well as business management) at

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[2] Washington Higher Educ. Coord. Board ("HECB"), *Washington Promise Scholarship Program Evaluation* 1 (2002), *available at* http://www.hecb.wa.gov/docs/reports/WaPromiseEval12-2002.pdf.

Northwest College, an accredited religious institution. Pet. App. 3a.[3] As petitioners concede, "Northwest's concept of education is distinctively Christian." Pet. Br. 10. Indeed, every student who applies to Northwest is "required to indicate 'a personal commitment to Jesus Christ as Lord and Savior.'" Pet. App. 3a. Moreover, "all" courses at Northwest have "religious content." J.A. 151; see *id.* 168-69. Yet petitioners concede they have no objection to respondent's using his scholarship to pursue general course work (including courses in religion) or a business management degree at Northwest, provided he does not actually *major* in pastoral studies. Pet. Br. 25. Given its religious character, however, Northwest considers its major in pastoral studies a core part of its curriculum. Thus, for the State to disqualify respondent based solely on his choice of that major is, in effect, also a governmental "disendorsement" of the institution and its religious mission.

For all these reasons, *amici* are deeply concerned about an argument, such as that advanced by petitioners and their *amici*, that would allow a government to create this kind of second-class citizenship for those who, as a matter of private choice, would spend public aid on services that have a religious character or perspective.

SUMMARY OF ARGUMENT

I. Government action that targets all religions or religious viewpoints for inferior treatment is not "neutral" towards religion and is, accordingly, subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993) ("*Lukumi*"). Like other forms of invidious discrimination, such as that based on race,

[3] It is undisputed that respondent's calling to the ministry, and to study pastoral studies in furtherance of that calling, is a sincerely held religious belief. *See* Pet. Br. 9 ("Davey is a Christian committed to living out his faith in every aspect of his life.").

discrimination on the basis of religion sends a message of disapproval or "disendorsement" from government. This disfavor alone imposes an inherent harm warranting strict scrutiny review, without the need to show any additional other burden, because the Free Exercise Clause "'protect[s] religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542 (alteration in original).

Thus, where a public funding program discriminates on the basis of religion, the Free Exercise Clause requires strict scrutiny whenever the government puts a recipient to a Hobson's choice between receiving a governmental subsidy to which he or she is otherwise entitled and using that subsidy to purchase goods or services from a religiously oriented provider. See *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Although government is not required to subsidize the exercise of constitutional rights, its programs cannot distinguish among recipients based on the exercise of those rights unless the government is prepared to meet the demands of strict scrutiny. Because the program at issue here discriminates solely on the basis of a religious choice—to pursue a degree in theology rather than a secular subject—the program is subject to strict scrutiny.

II. In this case, the State has not even attempted to show that its program satisfies strict scrutiny. And, if the State attempted such a justification, it would fail: the exclusion of otherwise-qualified recipients solely because they choose to major in theology cannot be narrowly tailored to further any imaginable compelling governmental interest.

To be sure, several of the State's *amici* assert that exclusions such as those here are necessary to protect State establishment principles that are stricter than those mandated by the federal Establishment Clause. However, especially where the aid is indirect and does not go primarily to religious organizations (thereby avoiding even the appearance of state advancement or endorsement of religion), a government cannot claim as a compelling interest a desire to effect a more

complete separation of church and state than that required by the federal constitution. That is not to say that States cannot legitimately pursue that objective. They can. And they retain a variety of constitutionally acceptable means of doing so. But they cannot pursue those policies in a way that infringes rights protected by the federal Free Exercise Clause.

ARGUMENT

This Court knows all too well the proper legal standard for determining the validity of a law that allegedly infringes a core First Amendment protection, such as free exercise of religion. It is first necessary to determine whether the policy is subject to strict scrutiny. If it is, the Court then decides whether the State can satisfy strict scrutiny by showing that its policy is narrowly tailored to advance a compelling governmental interest. Each of these issues is addressed in turn below.

I. THE FREE EXERCISE CLAUSE REQUIRES STRICT SCRUTINY OF ANY GOVERNMENT DISCRIMINATION ON THE BASIS OF RELIGION.

There can be no serious question that a government policy that discriminates against religion is subject to strict scrutiny, even if the policy discriminates against all religions equally. Such a policy is not "neutral" with respect to religion, and therefore is not subject to the limitation adopted by this Court in *Employment Division* v. *Smith*, 494 U.S. 872 (1990) ("*Smith*"). Contrary to the arguments advanced by petitioners and their *amici*, moreover, a law that discriminates against religion is subject to strict scrutiny even without a separate showing of a burden on religion. And that is as true for government funding of programs as for other kinds of government action.

A. A Law That Discriminates Against All Religions Or Religious Viewpoints Equally Is Not "Neutral."

"The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in [the Court's] opinions." *Lukumi*, 508 U.S. at 523. Although laws that discriminate against all religion may be rare, and thus "not often at issue" in the Court's Free Exercise Clause jurisprudence, *id.* at 533, there can be no doubt about how they should be scrutinized: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some *or all* religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532 (emphasis added).[4]

Likewise, in *Smith*, this Court observed that the Free Exercise Clause would be violated if government generally permitted certain "acts or abstentions," but then "sought to ban [them] only when they are engaged in for religious reasons, or only because of the religious belief that they display." *Smith*, 494 U.S. at 877. Justice O'Connor's concurring opinion reflected a similar view, even while expressing concern that the majority opinion might protect

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[4] Even the concurring opinions in *Lukumi* readily accepted this general principle. Fully agreeing with this nondiscrimination mandate, several Justices wrote separately to urge greater free exercise protection for *neutral* and generally applicable laws that burden religion than that provided for in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Justice Souter, urging a reexamination of *Smith* as to neutral laws, recognized the "principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice." *Lukumi*, 508 U.S. at 559 (concurring in part and in judgment). Justice O'Connor joined Justice Blackmun in pointing out that the First Amendment embodies the "value of religious freedom as an affirmative individual liberty" and that protection operates independently of the Amendment's acknowledged "antidiscrimination principle." *Id.* at 577-78 (concurring in judgment).

too narrow a range of religious exercise. As her opinion put it, "few States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such." *Id.* at 894 (O'Connor, J., concurring in judgment).[5]

1. This, however, is that rare case in which a State has chosen to discriminate overtly against religion by disqualifying an otherwise-qualified student from a Promise Scholarship simply because he or she chooses to major in theology. Indeed, in that respect, the Washington policy is similar to the broad religious discrimination addressed in *McDaniel* v. *Paty*, 435 U.S. 618, 620 (1978).

That decision struck down a state law prohibiting clergy "'of any denomination whatever'" from serving as state delegates. *Id.* The Court was clear: "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. The law, moreover, was invalidated because it "impose[d] special disabilities on the basis of religious views or religious status." *Smith*, 494 U.S. at 877.

The religious exclusion in this case does the same thing. This case therefore gives the Court an important opportunity to reaffirm that all laws that single out religion in general for disfavored treatment, either facially or as applied, are subject to strict scrutiny.

2. Not surprisingly, petitioners and their *amici* nevertheless believe that such discrimination is not subject to strict scrutiny. Relying upon *Smith*, they contend that, in the words of one *amicus*, the Washington program is not subject

[5] Indeed, the Court's free exercise decisions usually have arisen in the context of laws that burden a particular religion or religious practice. *See, e.g.*, *Lukumi*, 508 U.S. at 531-46 (Santeria religion); *Smith*, 494 U.S. at 874 (Native American Church); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447-53 (1988) (lands sacred to the Yurok, Karok, and Tolowa Indians); *Sherbert* v. *Verner*, 374 U.S. 398, 403-06 (1963) (Seventh-Day Adventists).

to strict scrutiny because "[i]t does not target any *specific* religious practice or religious group." Br. of *Am. Cur.* Nat'l Sch. Bds. Ass'n 16-17 (emphasis added). They are wrong.

As noted above, *Smith*'s reasoning is squarely at odds with the notion that only discrimination *among* religions triggers strict scrutiny. Moreover, in the years since *Smith*, the Court has squarely held that, when laws that infringe religious exercise are not neutral towards "religion" (or not of general applicability) they *are* subject to strict scrutiny. See *Lukumi*, 508 U.S. at 531-32; *Smith*, 494 U.S. at 885. A law or policy that discriminates against all religion, like that at issue here, clearly is not "neutral" with respect to "religion." As the Court put it in *Lukumi*, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." 508 U.S. at 533; see *Smith*, 494 U.S. at 877-88.

The Court has also recognized two distinct ways in which a law may fail *Smith*'s neutrality requirement. First, the law may be *facially* non-neutral, for example, in that it "refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. Second, the law may be *practically* non-neutral, in that it is applied in a manner that targets religion as such. *Id.* at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."). Thus, even where a law is not facially discriminatory, a reviewing court must still "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz* v. *Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).[6]

[6] Similarly, the general applicability requirement is offended "when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542-43.

Applying this analysis, the Court in *Lukumi* concluded that government restrictions on ritual animal sacrifice were not "neutral" (and indeed not "generally applicable") because only religious animal killing was outlawed. 508 U.S. at 536-37. Numerous other kinds of animal killing, including hunting and commercial slaughtering, were exempt. *Id.* That is, similar conduct was permitted when it had a secular motivation, but prohibited if it had a religious motivation. That, the Court held, was sufficient to make the law non-neutral. *Id.* at 547.

In short, contrary to the arguments of petitioners and their *amici*, when government singles out not just one religion, but all religions, for discriminatory treatment, its action is subject to strict scrutiny. As the Ninth Circuit correctly recognized, the program here is neither facially nor practically neutral, and therefore must be analyzed under that "exacting" standard. Pet. App. 29a-31a.

B. A Law That Discriminates On Religious Grounds Is Subject To Strict Scrutiny Without Any Separate Showing Of A Burden On Religion.

Petitioners and their *amici* are also wrong in contending that Washington's policy does not trigger strict scrutiny because it does not make compliance with religious teachings impossible or illegal. See, *e.g.*, Pet. Br. 12, 24-26, 36-39; Br. of *Am. Cur.* State of Vermont 8; Br. of Am. Cur. Anti-Defamation League 9 (suggesting that because "Davey's religious practice has not been outlawed by the state," he has "suffered no harm"); Br. of *Am. Cur.* Nat'l Sch. Bds. Ass'n 15-16 (same). This argument fails for at least two reasons.

1. First and most obviously, once a law is shown not to be neutral or generally applicable under the analysis in *Smith*, all that must be shown to trigger strict scrutiny is that the law "burdens" religion in some fashion. It is not necessary to show that the discrimination puts individuals to the Hobson's

choice of complying with the requirements of their government or their faith.

On the contrary, non-neutral laws can infringe free exercise and substantially burden religion where the denial only makes religious exercise comparatively more expensive. That was the holding, for example, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963). There, the Court rejected the argument that a free exercise violation could not exist because the law at issue did not actually "prevent" plaintiff from practicing her religion, it just made her ineligible for a "privilege." *Id.* at 404. As the Court put it, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege," even absent an outright prohibition. *Id.* at 404 & n.6.

2. In any event, governmental discrimination on the basis of religion is sufficient to trigger strict scrutiny, without any separate showing of religious burden. As this Court put it in *Lukumi*, the Free Exercise Clause "'protect[s] religious observers against unequal *treatment*.'" *Lukumi*, 508 U.S. at 542 (emphasis added, alteration in original); see *id.* at 579 (Blackmun, J., joined by O'Connor, J., concurring in judgment) ("When a law discriminates against religion as such . . . it automatically will fail strict scrutiny."). Accordingly, as the Court put it in *Smith*, "we strictly scrutinize governmental classifications based on religion." *Smith*, 494 U.S. at 886 n.3.

Treating religious discrimination as constituting a sufficient "burden" on religion to invoke strict scrutiny fits well within the fabric of civil-rights law. Invidious classifications of citizens based upon religion, like those based on race, "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw* v. *Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)); accord *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184,

192 (1964). In the case of religion, this is so for at least two reasons.

The first reason such classifications are so "odious" is the stigma they create. In the case of race, the Court has often held that laws that classify by race "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643.[7] Similarly, in the case of religion, the Court has "often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Lukumi*, 508 U.S. at 532; see *Zelman* 536 U.S. at 669 (O'Connor, J., concurring) (First Amendment "'does not require the state to be [religion's] adversary'") (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947)).[8]

Indeed, an exclusion based on religion "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected," *Romer* v.

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[7] The Court's race discrimination cases, moreover, teach that government segregation can itself be a dignitary harm—even when the government still affords the benefit in question on a "separate but equal" basis—because it generates "a feeling of inferiority as to [the protected person's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown* v. *Board of Educ.*, 347 U.S. 483, 494 (1954); *cf. Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 250 (1964) (noting, under Title II, "'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'"). Thus, treating students differently "solely on the basis of race" deprives them of "equal educational opportunities" even if the "physical facilities and other 'tangible' factors may be equal." *Brown*, 347 U.S. at 493.

[8] The equal protection analogy is particularly useful given that "[i]n determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, '[n]eutrality in its application requires an equal protection mode of analysis.'" *Lukumi*, 508 U.S. at 540 (Kennedy, J.) (citing *Walz*, 397 U.S. at 696 (concurring opinion)).

Evans, 517 U.S. 620, 634 (1996)—in this case, those who wish to integrate their religion into their education. See *Lukumi*, 508 U.S. at 547 ("upon even slight suspicion that proposals for state intervention stem from animosity to religion . . . , all officials must pause to remember their own high duty to the Constitution and to the rights it secures"). As the Ninth Circuit concluded, the mere exclusion from a government program for pursuing a degree in theology "necessarily communicates disfavor." Pet. App. 22a. The notion that "the religious need not apply" is antithetical to the fundamental purpose of the Free Exercise Clause and should be subject to the highest judicial scrutiny for that reason alone.

In short, principles of nondiscrimination based upon a respect for central aspects of individual identity and dignity have as much force in the area of religion as in the area of race. Accordingly, the stigma created by religious discrimination should be sufficient to trigger strict scrutiny.

Second, because religion is in large measure a choice rather than an immutable characteristic, religious discrimination tends to create subtle (and sometimes not-so-subtle) coercive pressure on individual conscience. Thus, where government demands that an individual conform to a particular religious (or even an a-religious) norm as a condition of a government benefit, "[t]he harm is the interference with the individual's scruples or conscience"—an area that should be "fence[d] off from government." *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring). The burden that such discrimination imposes on religion is "as plain as it [was] in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not measurable in damages." *Id.* Thus, even if it produces no financial hardship or other tangible harm, the psychic discomfort of being treated differently because of a person's religious preferences or choices is itself a cognizable harm because of its inevitably coercive effect.

Accordingly, even though religious discrimination may sometimes be accompanied by more concrete harms—such as criminal prosecution or restrictions on otherwise-available privileges or benefits—such discrimination is properly treated as sufficient to trigger strict scrutiny.[9]

C. A Denial Of Public Funding Requires Strict Scrutiny Where The Denial Is Based Upon Religion-Based Choices.

As these principles establish, denials of public funding that single out religion for adverse treatment, no less than other more direct discrimination on the basis of religion, trigger strict scrutiny. In this respect, this case presents a classic example of an unconstitutional condition on public funding. As the Court explained in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), "if the government could deny a benefit to a person *because of* his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597 (emphasis added).[10] This logic applies with equal force to the free exercise of religion. As *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), proclaimed more broadly, "the government may not deny a benefit to a person because he exercises a

[9] In all events, strict scrutiny should be applied because this case also involves a "hybrid situation" that implicates respondent's Free Speech and Equal Protection rights. *See Smith*, 494 U.S. at 881-82; *see generally* William L. Esser IV, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 Notre Dame L. Rev. 211 (1998); *Chalifoux* v. *New Caney Ind. Sch. Dist.*, 976 F. Supp. 659, 670-71 (S.D. Tex. 1997) (applying hybrid rights analysis to school's banning of rosary beads as gang symbols).

[10] To similar effect is *Speiser* v. *Randall*, 357 U.S. 513 (1958). *Speiser* involved a California regulation that required anyone seeking a property tax exemption to declare that he or she did not advocate the forcible overthrow of the United States government. This Court stated that "[t]o deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.* at 518.

constitutional right." *Id.* at 545 (citing *Perry*, 408 U.S. at 597).

Here, there can be no question that revocation of respondent's Promise Scholarship because of a religiously motivated choice to declare a major in theology burdens his free exercise of religion. See, *supra*, n.3. Such a burden—regardless of the level of hardship—plainly triggers strict scrutiny.

1. Petitioners and their supporters nevertheless argue that, at least in the context of subsidy programs, government is free to discriminate on the basis of constitutionally protected criteria, citing *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998). In *Finley*, the Court upheld, against a Free Speech challenge, a policy that permitted the National Endowment for the Arts ("NEA") to use "'decency and respect'" as criteria in deciding which art programs to fund. *Id.* at 576. Petitioners argue that, because the Court held that NEA funding did not create a limited public forum, and thus that strict scrutiny did not apply there, the Court should hold that Washington's action does not trigger strict scrutiny either. Pet. Br. 44-45.

But the Court in *Finley* did not so hold. Petitioners quote from a *concurring* opinion in that case that rejected the limited public forum rationale. *Finley*, 524 U.S. at 599 (Scalia, J., concurring in judgment). The majority opinion, however, explicitly recognized that the "First Amendment certainly has application in the subsidy context." *Id.* at 587. The Court, moreover, pointed out that the competitive funding at issue there differed from the widely available and neutrally administered resources at issue in cases such as *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1983), and *Rosenberger*. That was because the NEA could apply criteria of excellence and decency that it could not apply if it were directly regulating speech or operating a program of general subsidies. And even in that context, the Court expressly warned that the wide

latitude to set spending priorities could "not infringe on other constitutionally protected rights." *Finley*, 524 U.S. at 588.

What *Finley* stands for, therefore, is that in running competitive funding programs, a government can use criteria that would otherwise be invalid under the Free Speech Clause, as long as it does not run afoul of *other* constitutional limits. For instance, the NEA could reject art for aesthetic reasons, and even reasons of decency, but it could not choose (or refuse) to fund only artists who were white or black. And, to bring the point closer to home, neither could it choose (or refuse) to fund only artists who were Jewish, or Protestant, or Catholic, or Muslim, or secularist.

Yet this, in essence, is what Washington is doing in its scholarship program—drawing lines along constitutionally forbidden religious lines. Unlike *Finley*, the Washington program lacks the avowedly subjective element of artistic judgment that characterized the selection process at issue there. In this case, by contrast, if a student attains a certain class rank and income level, and enrolls in an accredited school, one obtains the Promise Scholarship money as of right—except, of course, if one decides to major in theology. This is, therefore, just the type of infringement on "other constitutionally protected rights" that *Finley* expressly forbids.

2. Other government subsidy decisions invoked by petitioners and certain *amici* are equally inapt. Significantly, in both *United States* v. *American Library Ass'n*, 123 S. Ct. 2297 (2003), and *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the plaintiffs sought funding for classes of activities that were plainly *outside* the parameters of the government program altogether.

In *American Library Ass'n*, for example, the Court rejected a First Amendment challenge to a federal program that helped provide public libraries with Internet access on the condition that pornography filters be installed. The Court reasoned that

the federal initiative did not single out pornographic speech for improper censorship because the program's intent was "not to 'encourage a diversity of views from private speakers,' but . . . to facilitate research, [and] learning." 123 S. Ct. at 2305 (quoting *Rosenberger*, 515 U.S. at 834). In short, the government was paying for research infrastructure, not sponsoring any speech—pornographic or otherwise—so there was no singling out based on the exercise of a constitutional right.

Here, by contrast, petitioners established the Promise Scholarship program to provide educational funding for any academically gifted and financially needy student wishing to study at an in-State, accredited college or university. Having created such a broad program, the State then singled out a single major—theology, *i.e.*, religion taught from a religious perspective—for exclusion from the program.

Nor does *Rust* give petitioners any comfort. There, the Court upheld regulations that prohibit the use of federal funds provided under Title X of the Public Health Services Act, 42 U.S.C. §§ 300 to 300a-6, for abortion counseling. The Court distinguished this constraint from that in *Perry*, "because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized." *Rust*, 500 U.S. at 196. That is, Title X funds were authorized for "'*preconceptional* counseling, education, and general reproductive health care,'" not "'pregnancy care (including obstetric or prenatal care).'" *Id.* at 179 (quoting 42 C.F.R. § 59.2 (1989)) (emphasis added). Thus, those who wanted to use Title X funds for post-conception medical procedures, including abortion, were not selectively penalized "because of their constitutionally protected speech." To the contrary, those who received Title X funds could not convey information about abortion simply because Title X does not cover *any* post-conception care.

Here, by contrast, respondent has been excluded from the Promise Scholarship program "because of" his constitutionally protected right to choose to study religion from a religious point of view, and to prepare himself for the ministry rather than any secular profession. Like *American Library Ass'n*, *Rust* is simply inapt.

3. Petitioners and their *amici* also attempt to defend the Washington program on the ground that States are "not required to subsidize" the exercise of constitutional rights. Pet. Br. 22-32; see Br. *Am. Cur.* Nat'l Educ. Ass'n 1; Br. *Am. Cur.* Nat'l Sch. Bds. Ass'n 13-14. That may well be true in the abstract. But once the State elects to fund a given class of activity, it cannot then exclude an otherwise-eligible individual who would, as a matter of private choice, use that funding in aid of his religious exercise, without satisfying strict scrutiny. See Sec. I.A. & B, *supra*. Yet, in the present case, the State has mandated the forfeiture of an otherwise-available scholarship because of the exercise of religion, and is therefore invidiously discriminating against students like Respondent Davey.

This case, moreover, is not analogous to a governmental decision not to fund abortions. To the contrary, in the health care context, it is more closely analogous to a government decision to fund all health care of a given kind, but then exclude those who would make an otherwise-permissible health care choice based on religious reasons. For example, it is analogous to the State creating a health care allowance that could be spent on all circumcisions *except* those performed for religious reasons. The discrimination inherent in such a program would plainly trigger strict scrutiny, and the discrimination inherent in the Washington program triggers strict scrutiny for the same reasons.

In sum, the government may be free to establish spending programs that, based on religion-neutral criteria, incidentally exclude religiously motivated activity along with non-religious activity. But when government adopts a religious

criterion for determining eligibility for public funds, it must be prepared to satisfy the demands of strict scrutiny.

II. GOVERNMENT DISCRIMINATION ON THE BASIS OF RELIGION CANNOT BE JUSTIFIED BY A DESIRE TO AVOID INDIRECT PUBLIC FUNDING OF RELIGIOUS ACTIVITY, PARTICULARLY WHERE THERE IS NO GENUINE ENDORSEMENT OF RELIGION.

The conclusion that the religious discrimination imposed by Washington here is subject to strict scrutiny is fatal to Washington's program. That is because the State has not attempted to show, and could not show, that its policy is narrowly tailored to a compelling governmental interest. *E.g.*, *Lukumi*, 508 U.S. at 533. Indeed, as the Court held in *Lukumi*, "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* at 546.

Here, as shown below, the State cannot justify its religious discrimination merely by invoking a desire to avoid indirect public funding of a religious activity. To be sure, States have a compelling interest in adopting rules to avoid genuine Establishment Clause violations. But they cannot shield themselves from remote Establishment Clause risks by blatantly infringing Free Exercise Clause values. Moreover, the aid at issue here—otherwise neutral, widely available, indirect, voucher-type aid—falls well outside the "play in the joints" that this Court has held may exist between the requirements of the Free Exercise Clause and the Establishment Clause.

A. A Desire To Avoid Funding Religious Activity Cannot Be A Compelling Governmental Interest Justifying Religious Discrimination Where, As Here, The Funding Of Religion Is Indirect And Creates No Genuine Endorsement Of Religion.

1. Petitioners and their *amici* cannot seriously claim that the religious discrimination inherent in Washington's policy is required by the federal Establishment Clause. Indeed, in a virtually identical context (and in a case arising from the same State), this Court has already unanimously rejected the argument that the federal Establishment Clause requires the kind of religious exception at issue here. See *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

Most recently, moreover, the Court's decision in *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002)—a case petitioners do not address—upheld the constitutionality of a voucher program where the vast majority of recipients used the vouchers at parochial schools. *Zelman* underscored the point that where indirect, voucher-style aid is concerned, the free choice of private persons to use that aid for religious purposes is not an Establishment Clause concern. As *Zelman* made clear, the line of cases from *Mueller* v. *Allen*, 463 U.S. 388 (1983), *Witters*, and *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), affirm the principle that the "deliberate choices of numerous individual recipients," 536 U.S. at 652, and not the government's desire to restrict its funds, is the controlling factor with respect to indirect funding of religious activity.

Here as well, the choice of how to spend the Promise Scholarship dollars, as well as the choice of majors, lies with the recipient, not with the State. And the intervening choice of recipients, such as respondent, relieves any concern that the State is supporting religion, or appearing to support religion, as opposed to supporting the recipient. *Id.* at 655;

accord *Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring in judgment).

Thus, on this point, the question before the Court is whether a State may engage in religious discrimination to enforce a separation of church and state that is appreciably wider than that required by the Establishment Clause, particularly where no informed observer could reasonably conclude that, by allowing respondent to choose to spend his scholarship money in pursuit of a theology degree, the State is somehow endorsing his particular religion, or religion in general. The answer, plainly, is "no."

2. The federal Establishment Clause has of course been construed to forbid *direct* use of "general assessments in support of religion," a practice which "lie[s] at the core of the prohibition against religious funding." *Rosenberger*, 515 U.S. at 851 (O'Connor, J., concurring). But this ban has not been viewed as prohibiting States from providing religiously neutral aid that has a primarily secular purpose and that only incidentally and/or indirectly furthers or supports the religious mission of religious organizations.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), for example, the Court recognized that, in a number of decisions, it had allowed State benefits to go to church-related schools as long as the benefits were secular, neutral, or non-ideological, and went primarily to the students or, if they went directly to the church-related school, were in no way to be used to further a religious purpose. Such permissible aid included bus transportation, school lunches, public health services, and secular textbooks. *Id.* at 616-17. Under *Lemon*, first, the "purposes" of the act must be "manifestly secular." Second, the primary "effect" of the legislation must not be to advance or inhibit religion. Third, the program must not create an "excessive entanglement" between church and state.

More recently, the Court has modified and clarified the *Lemon* test in a way that makes it abundantly clear that the

type of benefit provided by the Washington scholarship program—*i.e.*, otherwise neutral, widely-available aid that only incidentally and remotely furthers the religious educational purposes of school, and has a primarily secular purpose—is permitted under the Establishment Clause. In *Agostini* v. *Felton*, 521 U.S. 203 (1997), a *direct* aid case, the Court allowed teachers hired by the State to present secular subjects to school children on parochial school premises. The Court ruled that the state aid was religiously neutral, went directly to the eligible students, and did not supplant an educational function that the school would otherwise have been required to provide. *Id.* at 210, 226, 228-30, 234, 235.

Similarly, in *Mitchell* v. *Helms*, 530 U.S. 793 (2000), the Court held that giving State educational materials *directly* to religious schools was acceptable where that aid was religiously neutral and where there were safeguards in place to prevent that aid from being used for religious purposes. *Id.* at 810-14; *id.* at 841-88 (O'Connor, J., concurring in judgment).

In a refinement of the *Lemon* test, the majority opinion in *Agostini* and the controlling opinion in *Mitchell* set out a three-part test to decide if state aid impermissibly advances or endorses religion. *Id.* at 845 (O'Connor, J., concurring in judgment). The first question is whether "the aid results in government indoctrination." The second is whether the program "defines its recipients by reference to religion." And the third is whether it creates an "excessive entanglement between government and religion." *Id.*

The Promise Scholarship program, if extended to theology students, would not violate any of the criteria of this most recent (or even the original) explication of the *Lemon* test. First, State scholarship funds would not advance religious indoctrination by the government because the private individual has full and free choice where to go to school and

what to learn.[11] Second, giving the scholarship to all majors would remove the present practice of excluding certain recipients by reference to religion. Third, the fear of "excessive entanglement" between church and state would not be implicated because of the intermediary of individual student choice. Moreover, including all students regardless of major would *reduce* entanglement. The state would not have to inquire whether a particular school's religious studies program was "academic" or "sectarian."[12]

In short, the Court has repeatedly held that even *direct* aid to religious institutions can satisfy the demands of the Establishment Clause if it satisfies these three criteria. *A fortiori*, a program of *indirect* aid that satisfies these criteria—and indeed is less substantial than that which the Court has already found acceptable in *Agostini* and *Mitchell*—is far outside any "gray area" or "play in the joints" that may exist between the point where Establishment Clause concerns end and Free Exercise Clause values begin.[13]

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[11] Many persons who study theology, even in sectarian programs, use that degree not to promote religion (at least as, for example, a priest or pastor), but as a foundation for further study in a wide variety of non-religious fields, including business, law, medicine and education. Thus, even the education of theology students, although an incidental and attenuated effect of the Washington scholarship program, fulfills in significant part the State's secular purpose of furthering higher education.

[12] By contrast, with the theology exclusion, petitioners' program runs afoul of two of the three prongs of the Court's Establishment Clause test. It explicitly defines scholarship recipients by religious criteria, excluding those it deems to be studying within sectarian religion departments. It also creates excessive entanglement in determining what institutions might offer sectarian versus academic programs in theology.

[13] The indirect nature of the scholarship money also obviates the need for the safeguards set up in *Agostini* and *Helms* to ensure that money will not be used for religious purposes. Because the scholarship money is in the hands of a private actor, who decides whether to put it to religious use, there is no real risk that such use will be viewed as "State action" by *informed* observers. *See, e.g., Wallace* v. *Jaffree*, 472 U.S. 38, 69-70

B. Even If They Cannot Claim A Compelling Interest In Creating A Stricter Separation Of Church And State Than Required By Federal Law, States Still Have Ample Room To Pursue Such A Separation.

That is not to say, as claimed by various *amici* in support of petitioners, that such a result deprives governments of the discretion to pursue a stricter separation of church and state than that required by the Establishment Clause. See, *e.g.*, Br. *Am. Cur.* State of Vermont 3. A proper respect for the demands of the Free Exercise Clause allows ample room for State policy-making in this important area.

Here, of course, the Promise Scholarship comes nowhere near the boundary of this concern. Washington merely asserts, without support, an alleged constitutional harm from Davey's receipt of the Promise Scholarship. But this Court has long held that speculative and insubstantial fears of a constitutional violation are an insufficient governmental interest, one which is neither compelling nor legitimate. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205, 221 (1972) (rejecting

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(1985) (O'Connor, J., concurring in judgment) (focussing on whether an informed observer would believe government action can fairly be seen as "endorsing" a particular religious belief); *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 348-49 (1987) (O'Connor, J., concurring in judgment) (focussing on the informed observer in determining likely "endorsement" consequence of a religious exemption to a generally applicable statute). Thus, the State cannot justify the policy at issue here based upon an interest, however compelling it may be in the abstract, in avoiding the appearance of governmental endorsement.

Perhaps a State in another case could claim such an interest if the aid would otherwise go directly to the religious institution, without the intermediary of private choice, or if the aid, albeit indirect, was used primarily to benefit religious institutions—even if those results were found not to violate the federal Establishment Clause. But absent such circumstances, a desire to create a more complete separation between church and state than the federal Establishment Clause requires cannot be considered a compelling State interest.

"a sweeping claim" of government interest as not sufficiently concrete "[w]here fundamental claims of religious freedom are at stake"), see also *Denver Area Educ. Telecomm. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 773-74 (1996) ("When the Government acts to suppress directly the dissemination of [indecent] speech," under strict scrutiny review, "it may not rely solely on speculation and conjecture.") (Stevens, J., concurring). As in *Lukumi*, the purported governmental interest here appears to be merely a fig leaf for the State's anti-religious animus. 508 U.S. at 533-39.

1. Even if a prohibition on State discrimination against religion is the only way to satisfy strict scrutiny in a particular case, such a prohibition need not inhibit the States' ability to impose many other types of restrictions on the provision of public money to religious pursuits beyond what is required by the Establishment Clause. For example, a State that chooses to provide food stamps could limit its program to only certain essential foods, or to foods with certain nutritional qualities, or to foods that were not luxury items. It could not, however, create a program to fund essential food items for poor people but then exclude only kosher foods from the list of acceptable items or refuse to allow only kosher stores to participate in the program.

Likewise, in the context at issue here: Washington could pursue a variety of strongly separationist policies for its scholarship program that would not run afoul of the Free Exercise Clause. For example, absent evidence that religious schools were being targeted, the Promise Scholarship could be offered only to students who attend public schools. Or the program could be offered only to students who study particular subjects, such as math and engineering. Or it could be offered only to students who plan to attend a school focused on particular professional training, such as teaching or medical care.

Indeed, as long as the list of disciplines for which this indirect funding is aimed does not reflect an illicit attempt to gerrymander religion out of the program, Washington can administer its program in numerous constitutionally permissible ways. What it cannot do, however, is open up a broad funding program for which an individual is otherwise qualified, and then directly or indirectly disqualify that individual solely on the basis of religion.

2. This conclusion is hardly surprising, given that a State's interest in achieving greater separation of church and state than that provided by the federal Establishment Clause has always been limited by the federal Free Exercise Clause. For example, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court struck down a university's policy of prohibiting religious groups from meeting in its facilities despite the State's desire to achieve greater separation. *Id.* at 276. Likewise, in *Good News Club* v. *Milford Central School*, 533 U.S. 98 (2001), the Court held that a public school's exclusion of a private club from after-hours use of public school facilities because of its "religious nature" constituted unconstitutional viewpoint discrimination. *Id.* at 107-12. The Court further held that there was no valid governmental Establishment Clause interest in preventing private religious groups from meeting in school facilities after school and that government neutrality toward religion is satisfied by permitting equal access. And, "[b]ecause [the Court] h[e]ld that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for [the government] that purely religious purposes can be excluded under state law." *Id.* at 108 n.2.

To be sure, the Court has long recognized the existence of some "play in the joints" between the Free Exercise and Establishment Clauses of the First Amendment in the sense that the "limits of permissible state *accommodation* to religion are by no means co-extensive with the

noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673 (emphasis added); see *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 81 (1980) (States may "adopt in [their] own Constitution[s] *individual liberties more expansive* than those conferred by the Federal Constitution.") (emphasis added). *Amici* seek, however, to establish a "play in the joints" dedicated not to the expansion of religious freedom but for further separation of church and state. They cite no authority for this novel use of the concept of "play in the joints" to *restrict* religious freedom.

This Court's decisions certainly do not use the phrase that way. In *Walz*, for example, the Court expanded religious liberty by approving New York's grant of a property tax exemption to religious organizations for property used solely for religious purposes. In doing so, the Court noted its "struggle[] to find a neutral course between the two Religion Clauses, which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668-69. As Justice Harlan put it, neutrality does not create "'so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.'" *Id.* at 669 (quoting *Sherbert*, 374 U.S. at 422 (Harlan, J., dissenting)). Rather, it allows room to fashion greater protections "in the joints" between the federal Free Exercise and Establishment Clauses "productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*

Similarly, this Court expanded religious liberty in *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987), by recognizing that there was room "in the joints" to allow religious institutions to consider religion in employment decisions pursuant to a statutory exemption for religious bodies. Specifically, the Court found that Congress's creation of an exemption in § 702 of the Civil Rights Act to allow religious organizations to make employment decisions on the basis of religion, even as

applied to the secular activities of those organizations, did not violate the Establishment Clause. As the Court opined, "'government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Id.* at 334. Indeed, Justice O'Connor expressly recognized that "government efforts to accommodate religion are permissible when they remove burdens on the free exercise of religion"—even where the Free Exercise Clause would not require their removal. *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601 n.51 (1989) (citing *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in judgment)).[14]

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[14] Congress has likewise repeatedly recognized room to legislate in the area between the federal Establishment and Free Exercise Clauses. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") provides greater free exercise protections for religious institutions' use of their land and buildings while avoiding the appearance of government endorsement of religion in violation of the Establishment Clause. 42 U.S.C. § 2000cc.

The States, moreover, have repeatedly used this breathing room to provide greater protections for religion than the Free Exercise Clause requires. For example, in *Humphrey* v. *Lane*, 728 N.E.2d 1039, 1045 (Ohio 2000), the Supreme Court of Ohio acknowledged that "the Ohio Constitution's free exercise protection is broader" than the federal Constitution in sustaining a free exercise challenge to State policy. Similarly, the Supreme Court of Alaska held that "a state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution," in rejecting the use of both the State and federal Free Exercise Clauses as a defense to charges of discrimination. *Swanner* v. *Anchorage Equal Rights Comm'n*, 874 P.2d 274, 280 (Alaska 1994). And, in *State* v. *Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990), the Minnesota Supreme Court protected the religious freedom of Amish drivers against general laws prohibiting slow-moving vehicles under the Minnesota Constitution, rather than under *Smith*. Moreover, a number of state Religious Freedom Restoration Acts, which apply the compelling interest test to neutral laws that impact religion, also rely on this important doctrine of "play in the joints" in providing greater protection than that required by the Free Exercise Clause. At least a dozen states have passed such laws in the last decade. *See, e.g.*, Ala. Const. amend. No. 622 (Alabama Religious Freedom Amendment); Ariz. Rev. Stat. § 41-1493 *et seq.*; Conn. Gen. Stat. § 52-571b; Fla. Stat. Ann. § 761.01 *et seq.*; Idaho Code tit. 73; 775 Ill. Comp. Stat. 35/1 *et seq.*; N.M. Stat. Ann. § 28-22-1 *et seq.*; Okla. Stat. tit. 51, § 251; 71 Pa. Cons. Stat. § 2401; R.I. Gen. Laws § 42-80.1-1 *et seq.*; S.C. Code Ann. § 1-32-10 *et seq.*; Tex. Civ. Prac. & Rem. Code Ann. § 110.001 *et seq.*

In short, the concept of "play in the joints" has been widely understood to refer to the room the States and Congress have to offer *protections* of free exercise above those mandated by the federal Free Exercise Clause—so long, of course, as they do not intrude into Establishment Clause limitations. The Court should reject the efforts by petitioners and their *amici* to turn that concept into a justification for governmental policies that restrict religious freedom and that, as in this case, plainly violate the Free Exercise Clause.

* * * *

A State has no obligation to fund the exercise of religious rights. However, once it has created and opened up a program to a broad cross-section of the public, it cannot then disqualify otherwise-qualified recipients simply because they, as a matter of private choice, would spend their aid in furtherance of a religious end. Such a denial of equal access on the basis of religion is flatly prohibited by the Free Exercise Clause.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondent's brief, the decision below should be affirmed.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Association of Southern Baptist Colleges and Schools ("ASBCS") is an incorporated entity formed to provide and maintain an organization through which educational institutions located in the territory of the United States and currently or historically cooperating with Southern Baptists may work together in promoting the interests of Christian education. ASBCS has approximately fifty-four (54) members, all of which are non-profit organizations formed for educational purposes.

The Association of Christian Schools International ("ACSI") is a nonprofit, non-denominational, religious association providing support services to more than 4,100 Christian preschools, and elementary and secondary schools in the United States. Services are also provided to more than 160 colleges and universities, including Northwest College, which Respondent Joshua Davey attended during his undergraduate work. ACSI has eleven offices in the United States. ACSI's headquarters and international office is located in Colorado Springs, Colorado.

Azusa Pacific University ("APU") has been developing disciples and scholars since 1899. It is a comprehensive Christian, evangelical university, dedicated to excellence in higher education, and to making a positive impact on society. The main campus is northeast of Los Angeles, with several other locations throughout California. Total student enrollment exceeds 6,800. APU offers more than 40 areas of undergraduate study, 19 master's degree programs, and four doctorates. Many of its students rely on government sponsored loans and grants to pay for their tuition and other educational expenses. APU thus has a strong interest in preventing state discrimination against religious individuals and entities in the distribution of government benefits.

Brigham Young University ("BYU") is an institution of higher education sponsored by the Church of Jesus Christ of Latter-Day Saints, and located in Provo, Utah. BYU is part of the Church's Church Educational System, which serves more than one million people worldwide through institutions of higher education, seminaries, elementary and secondary schools, and continuing education and literacy programs. BYU seeks to promote the rigorous study of secular, academic subjects, in light of and from the perspective of the restored gospel of Jesus Christ.

The Catholic University of America in Washington, D.C. is unique as the national university of the Catholic Church and the only higher education institution founded by the U.S. Bishops. Established in 1887 as a graduate and research center, Catholic University is the only U.S. university with ecclesiastical faculties granting canonical degrees in canon law, philosophy and theology. As a Catholic university, it desires to cultivate and impart an understanding of the Christian faith within the context of all forms of human inquiry and values. It seeks to provide a place for continuing reflection, in the light of Christian faith, upon the growing treasure of human knowledge. It is a private, coeducational research university with more than 150 master's and doctoral programs as well as an undergraduate program, offered in 11 schools and the Metropolitan College. Catholic University has 350 full-time faculty and more than 5,000 students.

Loma Linda University ("LLU") is a Seventh-day Adventist educational health-sciences institution with 3,000 students located in Southern California. LLU is comprised of seven schools and the Faculty of Religion. More than 55 programs are offered by the schools of Allied Health Professions, Dentistry, Medicine, Nursing, Pharmacy, Public Health, and the Graduate School. LLU offers curricula ranging from certificates of completion and associate in science degrees to doctor of philosophy and professional doctoral degrees.

Pepperdine University is an independent, private university committed to fostering academic excellence in the context of Christian values. The University formally affirms that "the educational process may not, with impunity, be divorced from the divine process." It has been recognized nationally for its excellent academic programs and enrolls approximately 8,000 full-time and part-time students in its five colleges and schools. With a full-time faculty of more than 300 professors and scholars, Pepperdine offers bachelor, master and doctoral studies in a wide range of disciplines.